91-1074

No. 91-

in the Supreme Court of the United States

OCTOBER TERM, 1991

ALLAN F. MEYER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER A JURY INSTRUCTION IN A CRIMINAL CASE INVOLVING A MULTIPLE OBJECT CONSPIRACY REQUIRES THE GOVERNMENT TO BEAR THE BURDEN OF PROVING, TO THE UNANIMOUS SATISFACTION OF THE JURY, ALL ELEMENTS OF THE CHARGED CONSPIRACY?

II.

CAN A TRIAL COURT CHARGE THE JURY IN A MANNER WHICH IS CONTRARY TO THE VIOLATION CONTAINED IN THE INDICTMENT AND WHICH SUBSTANTIALLY BROADENS AND AMENDS THE VIOLATION?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Allan F. Meyer, and the Respondent, United States of America.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Allan F. Meyer respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in *United States v. Meyer*, 943 F.2d 1317 (11th Cir. 1991), rehearing denied September 24, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *United States v. Meyer*, 943 F.2d 1317 (11th Cir. 1991).

JURISDICTION

On August 13, 1991, the United States Court of Appeals for the Eleventh Circuit affirmed the decision of the district court. A petition for rehearing was timely filed, and denied on September 24, 1991. The jurisdiction of this court to review the judgment of the United States Court of Appeals for the Eleventh Circuit is invoked under 28 U.S.C. §1254(1) and Supreme Court Rule 13. *Carroll v. United States*, 354 U.S. 394 (1967).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides the following:

> No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States states the following:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

A. The Case.

Allan F. Meyer originally was charged with nine violations of law (R1-1):

> Count 1: Conspiracy to commit the following offenses:
>
> a. Making false representations or concealing facts in documents required by ERISA (substantive charge included in Count 2);
>
> b. Embezzlement of pension fund money (substantive charge included in Count 3); and
>
> c. Mail fraud (substantive charges included in Counts 4-9).
>
> Count 2: Making or aiding and abetting the making of false statements and concealment of facts in documents required to be kept by ERISA, in violation of 18 U.S.C. §1027.

Count 3: Embezzlement from an ERISA fund, in violation of 18 U.S.C. §664.

Counts 4-9: Mail fraud, in violation of 18 U.S.C. §1341.

These charges arose from the allegations that Allan Meyer, a lawyer, committed fraud and participated in the embezzlement of funds arising out of a loan using monies which originated as the pension funds of Local 701, Mid-Jersey Trucking Industry of the International Brotherhood of Teamsters ("the Fund"), but which had been given to Omni Funding Group, Inc. ("Omni"), a Florida based mortgage company controlled and operated by Joseph Higgins ("Higgins"). The charges focused on the "Glades Citrus" loan, in which Higgins was alleged to have been the beneficiary of those loan proceeds, even though Higgins was prohibited by law from participating in Fund transactions.

The indictment, in essence, accused Allan Meyer of assisting Higgins in obtaining benefits from the Fund to which he was neither authorized nor entitled. The Fund did not lose any money and the loan was repaid in full by Allan Meyer. Allan Meyer was, according to the indictment and the government's evidence at trial, a "straw" or nominee beneficiary of the loan, who acted to conceal the interest of Higgins in the loan.

At the conclusion of a 14-day trial, the jury convicted Allan Meyer only on Counts 1 and 2, and acquitted him of the other charges. The district court sentenced Meyer to concurrent terms of one year imprisonment. Allan Meyer was released on bail pending appeal.

Allan Meyer raised six issues before the appellate court on direct appeal. The appellate issues included the following:

1. Whether the evidence was sufficient to support the conspiracy and ERISA convictions?

2. The trial court erred in failing to instruct the jury that materiality was an essential element of the false statement (ERISA) offense charged in Count 2.

3. The district court erroneously instructed the jury that the false statement violation in Count 2 could be established on the basis of either of the two methods charged in the indictment, and in so doing impermissibly broadened and constructively amended the charge.

4. The trial court erred in reinstructing the jury on the unanimity instruction regarding the elements of a multiple object conspiracy.

5. The court erred in allowing the government to introduce evidence of events outside the scope of the charged conspiracy.

6. The trial court erred in restricting the cross-examination of the key prosecution witness as to whether she was a conspirator.

On August 13, 1991, this court affirmed the two convictions and concurrent sentences in a per curiam affirmance. *United States v. Meyer*, 943 F.2d 1317 (11th Cir. 1991). In so affirming, the court declined to discuss any of the issues raised on appeal, including several issues which are substantial and raise issues of first impression in this court. The court thereafter denied rehearing.

B. The Facts.

Allan Meyer's trial focused on the government's accusation that Allan Meyer willfully and knowingly assisted Joseph Higgins in obtaining a $1.075 million loan from the Fund, even though Higgins was not entitled to benefit from the Fund because he was a "fiduciary" of and "service provider" to the Fund. Higgins' ineligibility to benefit from Fund transactions was in contrast to the written documents which authorized Higgins' company, Omni, to invest Fund monies. Those operative documents expressly permitted Higgins to "participate" in Fund transactions.

At the end of 1983, Omni financed the purchase of a citrus grove in Ft. Pierce, which came to be known as the "Glades Citrus" transaction. The purpose of this transaction was to enable Joseph Higgins to acquire the grove as a tax sheltered investment, prompted by Higgins' substantial taxable income. When Higgins was unable to obtain a loan from the International Longshoreman's Association pension fund, he decided to obtain financing from Omni.

To effect this transaction, Higgins asked Allan Meyer to take title to the property and the loan from Omni in Meyer's name, which made Allan Meyer legally and morally responsible for repayment of the loan. Allan Meyer then took title to the property and obligated himself on the Omni loan in the name of Glades Citrus, Allan Meyer's company (R9-47-48). The mortgage deed was made in favor of Glades Citrus, which was the owner of the property (R12-12-13; Govt. Ex. 34). The property was subsequently transferred to Higgins (R9-50), who was responsible for making loan payments (R9-49). But, if loan payments were not made and Glades Citrus/Allan Meyer did not insure that the payments were made, Omni was entitled to foreclose on the loan (R12-15-16).

Each year, the Fund is required to file an annual report with the IRS and the Department of Labor, known as a Form 5500/Annual Report. The Form 5500s for the fiscal years 1983 and 1984 (Govt. Ex. 166 & 167) were prepared by the accounting firm of Beck Weiss & Co. These Form 5500s, according to the trial evidence, did not include a disclosure that Higgins, as a party-in-interest, was involved in the Glades Citrus transaction with Fund money. These reports were the principal proof of the government's allegations that Allan Meyer assisted in the submission of false or misleading ERISA-required documents.

The Form 5500s, in fact, included references to a civil lawsuit brought by the Fund against Omni and Higgins for party-in-interest loans. The Form 5500s also refer to appendices prepared by the accountants which generally described party-in-interest transactions involving Higgins and Omni.[1]

During the course of the trial, the district court made a number of rulings concerning jury instructions which were claimed by the defense to be erroneous. First, the district court explained to the jury that the false statement violations (Count 2) could be established on the basis of either of the two conjunctive methods charged in the indictment. In so doing, the court impermissibly broadened and constructively amended the charge. Also, during the fourth day of deliberations, the jury requested that the court provide guidance regarding the proof of the objects of the multiple object conspiracy. The court's reinstruction departed from the prior instructions and differed from the standard multiple object conspiracy instructions, in a manner which required the jury's unanimous decision to

[1] The appendix to the 1982 Form 5500 was not included in Govt. Ex. 166 which was submitted to the jury. That appendix, which further described the Higgins-Omni party-in-interest transactions, was discovered by defense counsel only after the appeal commenced.

encompass unanimity for elements of a guilty verdict and unanimity for all elements of a not guilty verdict. This additional inaccurate allocation of the burden of proof jeopardized Allan Meyer's right to a fair trial.

REASONS FOR GRANTING THE WRIT

I.

A JURY INSTRUCTION IN A CRIMINAL CASE INVOLVING A MULTIPLE OBJECT CONSPIRACY REQUIRES THE GOVERNMENT TO BEAR THE BURDEN OF PROVING, TO THE UNANIMOUS SATISFACTION OF THE JURY, ALL ELEMENTS OF THE CHARGED CONSPIRACY.

The appeal in this case raised a question of first impression for the Eleventh Circuit. That court's failure to resolve that question has resulted in the great possibility that defendants in criminal cases will be obligated to prove their innocence, while the prosecution will be relieved of its responsibility to prove all elements of the offense charged beyond a reasonable doubt. The question concerns the proper definition of the elements of the multiple object conspiracy, a definition which has uniformly been a standard part of the pattern jury instructions applicable to criminal cases. By redefining the elements of the multiple object conspiracy, the lower court not only departed from the clear language of Eleventh Circuit Offense Instruction 4.2, but further conflicted with substantial precedent, including *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977), *United States v. Ballard*, 663 F.2d 534, 544 (5th Cir. 1981), and *United States v. Duncan*, 850 F.2d 1104 (6th Cir. 1988). But, without any analysis, the appellate court affirmed the district court's decision. That affirmance has altered traditional notions which have preserved the burdens applicable to criminal prosecutions.

Allan Meyer's trial was a difficult one. The jury deliberated over the course of five days and rejected the bulk of the government's case, finding Allan Meyer guilty only of conspiracy and a technical ERISA offense. The jury's confusion became evidence when, at the end of the fourth day of deliberations, the jury addressed its eleventh question to the court. That question expressed confusion as to the elements of the conspiracy instruction and sought further guidance regarding proof of the objects of the conspiracy. The jury seemed especially troubled with the process by which they could come to a not guilty verdict. The trial court summarized the jury's confusion as follows (R24-17-18):

> We are not now—we are not—and so we are clear on the point, in the instructions, in Jury Instruction Number 12, Conspiracy, Multiple Objects, pertaining to the verdict, quote: It would be sufficient if the government proves, beyond a reasonable doubt, that the defendant willfully conspired with someone to commit one of those offenses; but, in that event, in order to return a verdict of guilty, you must unanimously agree upon which of the three offenses the defendant conspired to commit. If you cannot agree in that man-ner, you must find the defendant not guilty, end quote.
>
> They were quoting from a portion of instruction 12.
>
> The note goes on to say: We understand that if we unanimously vote guilty on at least one offense, then the verdict would be guilty. What we don't understand is if there is no unanimous agreement on any one offense, then is the defendant not guilty, or would we continue to deliberate until there is a unanimous decision either way. That's the note.

Responding to the jury's question the next day, the court reread instructions No. 1 (presumption of innocence and burden of proof), No. 2 (reasonable doubt), No. 12 (conspiracy-multiple objects), and No. 27 (deliberations) (R25-17-20). The court then expanded upon the conspiracy instruction, and effectively emasculated the multiple object charge (R25-24-25):

> In such a case it's not necessary for the Government to prove that the defendant under consideration willfully conspired to commit all of those substantive offenses. It would be sufficient if the Government proves, beyond a reasonable doubt, that the defendant willfully conspired with someone to commit one of those offenses; but, in order to return a verdict of guilty, you must unanimously agree upon which of the three offenses the defendant conspired to commit. If you can't agree in that manner, you must find the defendant not guilty.
>
> Now, with regard to count 1, in order to return a verdict of guilty as to count 1, in addition to the elements as laid out in in-struction Number 11, you must also be unanimous that the Government has proven beyond a reasonable doubt that the defendant committed at least one of the objects of offenses as charged in count 1. You must all agree in order to return a verdict of guilty upon which of the three offenses the defendant committed. **In order to return a verdict of not guilty as to count one, you must all be unanimous in your finding that the Government has not proven beyond a reasonable doubt that the defendant committed any of the objects of the conspiracy.** [emphasis added].

> Now, if you are unable to reach unanimous agreement as to count one or, indeed, as to any other count, then you would be unable to return a verdict as to that particular count.

The court's instruction had the practical effect of advising the jury to disregard the prior instructions on the multiple object conspiracy. The reinstruction also substantially lessened the government's burden of proof, by requiring unanimity on *all objects* in order to find the defendant not guilty, but requiring unanimity on only *one object* to find the defendant guilty. Essentially, the court's reinstruction made it virtually impossible for the jury to acquit Allan Meyer unless every member of the jury was unanimous in concluding that the evidence did not satisfy *any object* of the conspiracy. Not only was this reinstruction directly contrary to the multiple object conspiracy instruction originally given to the jury, but it placed a more substantial burden on the jury to find the defendant not guilty than to find the defendant guilty.

Prior precedent in both the Eleventh Circuit and elsewhere supports the use of the standard jury instruction in its explanation of the unanimity requirement. The standard instruction, Eleventh Circuit Offense Instruction 4.2, informs the jury of the following:

> In this instance, with regard to the alleged conspiracy, the indictment charges that the Defendants conspired. . . it is charged, in other words, that they conspired to commit *two* separate substantive crimes or offenses.
>
> In such a case it is not necessary for the Government to prove that the Defendant under consideration willfully conspired to commit *both* of those substantive offenses. It would be sufficient if

> the Government proves, beyond a reasonable doubt, that the Defendant willfully conspired with someone to commit *one* of those offenses; but, in that event, in order to return a verdict of guilty, you must unanimously agree upon *which* of the two offenses the Defendant conspired to commit. **If you cannot agree in that manner, you must find the Defendant not guilty.** [emphasis added].

This standard instruction is correct in that it tracks existing law by telling the jury that if it cannot agree unanimously that the government proved a single object beyond a reasonable doubt, the only permissible verdict is not guilty. *United States v. Ballard*, 663 F.2d 534, 544 (5th Cir. 1981). *See United States v. Beros*, 833 F.2d 455 (3d Cir. 1987); *United States v. Mastelotto*, 717 F.2d 1238, (9th Cir. 1983), *overruled in part on other grounds, United States v. Miller*, 471 U.S. 130, 135, 105 S. Ct. 1811, 1814-1815 (1985).

The district court's reinstruction was wrong, and the appellate court's approval of the instruction was contrary to precedent, because that instruction turned the constitutional burden of proof on its head, informing the jury that the unanimity requirement obligated that the jury be unanimous that the government had proved *no* object beyond a reasonable doubt before Allan Meyer could be found not guilty. That plainly is not the law and is inconsistent with the controlling precedent. In *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977), the court explained that the unanimity requirement is designed to protect a defendant by permitting a conviction only where all jurors agree on what the defendant did. A jury cannot convict a defendant by agreeing that the defendant did something wrong, but disagreeing as to what the defendant did.

In a case like this, the jury reinstruction required the jury to find unanimously that the government has not proved every element of the multiple object conspiracy before it can return a not guilty verdict. The court told the jury that for Allan Meyer to be not guilty, every single member of the jury must agree as to what Allan Meyer did not do. This is not only an impossible burden, it is an unconstitutionally allocated burden. With this instruction, not only was the defense required to challenge the prosecution's case, but it had the extra burden to prove that *none* of the government's case was valid. Since it is the government's burden to prove the existence of each element of the offense beyond a reasonable doubt, it is *that* burden which must be unanimous proven. If the government so fails in its proof, the verdict must be not guilty, but the jury reinstruction did not permit that result.

This Court recently looked at the subject of multiple-object conspiracies in *Griffin v. United States*, ____ U.S. ____, No. 90-6352 (December 3, 1991), in a decision which approved the use of general verdicts when the evidence is sufficient to sustain the verdict. While not at issue in *Griffin*, an implicit recognition made in that case was jurors have sufficient capacity to analyze the evidence to determine its sufficiency. According to the *Griffin* rationale, if a jury is given instructions which alter the basic rules by which they can evaluate the evidence, a conviction is questionable. The appellate court's decision in this case effectively conflicts with Griffin's underlying theme.

The reinstruction at issue in this case involves an important question which requires resolution by the Court. Never before has a court set out the burdens of proof in a negative way, so that it is easier for the jury to convict a defendant than to acquit a defendant. The appellate court's approval of a shifting of the burden causes serious conflict with other court decisions, and is inconsistent with this

Court's *Griffin* opinion. This court should use this case as an opportunity to plainly and firmly provide guidance to all district and appellate courts as to the proper elements of a multiple object conspiracy. Any other result indisputably intrudes into the area of impermissible burden shifting.

II.

THE DISTRICT COURT'S JURY INSTRUCTION WAS CONTRARY TO THE CHARGE CONTAINED IN THE INDICTMENT AND THUS SUBSTANTIALLY BROADENED AND AMENDED THE CHARGE.

An indictment serves at least two separate functions within the context of American jurisprudence. It "preserves the protection given by the Fifth Amendment from being 'held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.' " *United States v. Silverman*, 430 F.2d 106, 110 (2d Cir. 1970), *cert. denied*, 402 U.S. 953 (1971). And, it "permits the accused 'to be informed of the nature and cause of the accusation' as required by the Sixth Amendment." 430 F.2d at 110. The district court in this case constructively altered the indictment by giving a broadened interpretation of the essential elements of the crime of making a false statement in connection with an ERISA matter.

The district court instructed the jury that in order to convict Allan Meyer of the false statement violation charged in Count 2, the evidence need only establish one of the two charged methods of violating 18 U.S.C. §1027. Over the defense objection, the court stated (R20-127-128):

> Now, ladies and gentlemen, in determining whether the Government has proved the third element—this is on count two—beyond a

> reasonable doubt, you must be unanimous in your conclusion whether the false statements or concealments of facts were in the form 5500 annual reports *or* unanimous in your conclusion whether the false statements or conclusions were in documents required to be kept by ERISA or both.

This instruction in the disjunctive differed from the grand jury's conjunctive charge.[2] By making the government's proof easier than what the grand jury charged, the district court impermissibly broadened and constructively amended the charge.

The appellate court's approval of this alteration of the charge raises serious constitutional questions, involving both the Fifth Amendment and Sixth Amendment guarantees. The jury was given an "either or" instruction, even though the grand jury charged Allan Meyer in the conjunctive. The expansion of the scope of an indictment through jury instructions becomes "reversible error if it is possible that the defendant was tried and convicted for a crime other than that alleged in the indictment." *United States v. Ylda*, 653 F.2d 912, 194 (5th Cir. 1981); *United States v. Bizzard*, 615 F.2d 1080 (5th Cir. 1980). A court cannot permit a jury to deliberate on an offense not indicted by the grand jury.[3] The

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[2]Count 2 alleged a violation of 18 U.S.C. §1027 by making misrepresentations or omissions "in the annual financial reports required to be published by the Fund. . . *and* in documents required to be kept by Title I of ERISA as part of the records of the Fund. . ." (R1-1-12) (emphasis added).

[3]The district court in this case amended the indictment by broadening the scope of the charges in its alteration of the terms set out in the indictment. An amendment occurs when the charging terms are altered. *United States v. Peel*, 837 F.2d 975, 979 (11th Cir. 1988). This constitutional protection is nonwaivable. *See Branzburg v. Hayes*, 408 U.S. 665 (1972); *Stirone v. United States*, 361 U.S. 212, 215-217 (1960). This is particularly so when proof at trial is based on a theory or evidence

(Footnote continued on next page)

consequence of a constructive amendment to a grand jury indictment is "per se reversible error because such an instruction violates a defendant's constitutional rights to be tried only on charges presented in a grand jury indictment and creates the possibility that the defendant may have been convicted on grounds not alleged in the indictment." *United States v. Weissman*, 899 F.2d 1111, 1114 (11th Cir. 1990).

Jury instructions are essential in a criminal case. The whole of the instructions must be an accurate statement of the issues and the law. *United States v. Caporale*, 806 F.2d 1487, 1514 (11th Cir. 1986), *cert. denied*, 483 U.S. 1021, 107 S. Ct. 3265 (1987). The trial court did not give a correct instruction, and the appellate court essentially approved the practice of judicial alteration of an indictment.

The Eleventh Circuit result is frightening, because it is so inconsistent with the law of the land—that a defendant in a criminal case is entitled to know the crime for which he is on trial. The lower court's ruling substantially lessened the government's burden of proof in a situation where the jury instructions were less than clear. Where a trial court's disjunctive instruction cut to the heart of the case by conflicting with the charge for which petitioner was on trial. This is a grievous violation of constitutional guarantees, and this error can only be corrected by a decision of this Court.

How can a defendant be indicted on one theory of culpability, but be convicted on another? It cannot happen under our system of law, unless the grand jury accuses the defendant of the particular crime of conviction. In this case, because the indictment charged a violation of the false statements offense by making false statements or

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(Footnote continued from previous page)
materially different from that presented to the grand jury. *United States v. Lambert*, 501 F.2d 943, 947 (5th Cir. 1974) (en banc); *United States v. Silverman*, 430 F.2d at 111.

concealments in both annual reports and documents required to be kept, it was constitutionally improper for the court to allow petitioner to be convicted based on a conclusion by the jury that only one of the two items contained false statements or omissions. This is in keeping with the decisions in *United States v. Trice*, 823 F.2d 80 (5th Cir. 1987), and *United States v. Weissman*, 899 F.2d 1111, 1114 (11th Cir. 1990). The effect of the trial court's jury instruction was to amend the indictment, a power which the district court does not have.

The conviction at issue in this proceeding resulted from a violation of the Fifth Amendment in that petitioner was convicted of a crime not charged by the grand jury. Since the charge submitted to the petit jury was much broader than that returned by the grand jury, this Court must use this case as a vehicle to provide guidance to district and appellate courts for their future handling of constructive amendment questions.

CONCLUSION

The decision of the Eleventh Circuit in this case is wrong and conflicts with prevailing precedent. The result reached by the appellate court threatens to undermine what has been settled law. This court should grant a writ of certiorari to review the judgment of the court below.

Respectfully submitted,

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Dated: December 23, 1991

Appendix

CONTENTS OF APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-5215

D.C. Docket No. 89-106-CR-SM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALLAN F. MEYER,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

(August 13, 1991)

Before TJOFLAT, Chief Judge, DUBINA, Circuit Judge, and WILLIAMS*, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.

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*Honorable Jerre S. Williams, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[September 24, 1991]

No. 90-5215

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALLAN F. MEYER,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

Before TJOFLAT, Chief Judge, DUBINA, Circuit Judge, and WILLIAMS*, Senior Circuit Judge.

PER CURIAM:

The petition for rehearing filed by appellant, Allan F. Meyer, is denied.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

*Honorable Jerre S. Williams, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

EXCERPT OF TRANSCRIPT OF JURY INSTRUCTIONS

(Transcript Pages R20-124-128)

[THE COURT:] Now, with regard to the second count, count two. Count two of the Indictment charges that the defendant, Allan F. Meyer, committed an offense against the United States in violation of a particular section of Federal law. It's Title 18, United States Code, Section 1027.

That section of Federal law, Title 18, United States Code, Section 1027 provides individuals in pertinent part the following: It says: Whoever, in any document required by Title I of the Employee Retirement Income Security Act—and that's what we refer to as ERISA—of 1974. . . to be published or kept as part of the records of any. . . employee pension benefit plan, . . makes any false statement or representation of fact, knowing it to be false or knowingly conceals, covers up or fails to disclose any fact the disclosure of which is required by such title or is necessary to verify, explain, clarify or check for accuracy and completeness any report required by such title to be published. . .shall be guilty of an offense against the United States. That's what the statute says.

Now, specifically, count two of the Indictment charges that the defendant, Allan Meyer, made, caused to be made and aided and abetted the making of false statements and representations of fact, knowing them to be false, and knowingly concealed, covered-up, and failed to disclose and caused and aided and abetted the concealment, cover up, and failure to make disclosure of facts in the annual financial reports required to be published by the fund for the plan years ending May 31, 1984, and May 31, 1985, and in documents required to be kept by Title I of ERISA in violation of this section of law, 18 U.S. Code, Section 1027. This charge is also included as the first object of count one of the conspiracy charge. The Indictment further states that

the false representations and concealment dealt with facts showing that the Glades Citrus loan was, in truth and in fact, a transfer of fund monies and assets for the use and benefit of Joseph J. Higgins as a party in interest in the fund.

Now, the defendant can be found guilty of violating Title 18, United States Code, Section 1027, only if all of the following facts are proved beyond a reasonable doubt. And there are five of them.

First, that the Mid-Jersey Trucking Industry Local 701 pension fund was an employee pension benefit plan within the meaning of Title I of the ERISA statute.

Second, that the fund was established or maintained by any employer engaged in commerce or in any industry or activity affecting commerce, or by an employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce, or both.

Third, that the defendant, in a form 5500 annual report of the fund, or in a loan document submitted by Omni Funding Group to the fund, or in a monthly report mailed from Southeast Bank to the fund, made, caused to be made or aided and abetted the making of a false statement or representation of fact, knowing it to be false, or knowingly concealed, covered up, or failed to disclose, or knowingly caused or aided and abetted the concealment, cover-up, or failure to make disclosure of any fact the disclosure of which is required to be disclosed by Title I of ERISA or is necessary to verify, explain, clarify or check for accuracy and completeness any form 5500 annual report of the fund.

The fourth fact that must be proven beyond a reasonable doubt before the defendant can be found guilty of count two is that the loan documents submitted by Omni Funding Group to the fund and the monthly report mailed from the Southeast Bank to the fund were documents

required by Title I of ERISA to be kept as part of the records of the fund.

Fifth, and last, that the form 5500 annual report was a report required by Title I of ERISA to be published by the fund.

Now, the parties in this case, by which I mean both the Government and the defense, have entered into a stipulation regarding the first, second and fifth elements of the offense charged in count two of the Indictment, leaving open and outstanding in dispute only the third and fourth elements as I read it to you. This stipulation was read to you by Government counsel during the Government's case in chief. Therefore, I charge you that the Mid-Jersey Trucking Industry, Local 701 pension fund was an employee pension benefit plan within the meaning of Title I of ERISA, that the fund was established or maintained by an employer engaged in commerce or in any industry or activity affecting commerce, or by an employee organization or organizations representing employees engaged in commerce, or both; and, moreover, they agreed that the form 5500 annual reports published by the fund and filed with the Secretary of Labor for the fiscal years ending May 31, 1984, and May 31, 1985, were documents required by Title I of ERISA to be published within the meaning of Title 18, United States Code, Section 1027.

Now, ladies and gentlemen, in determining whether the Government has proved the third element—this is on count two—beyond a reasonable doubt, you must be unanimous in your conclusion whether the false statements or concealments of fact were in the form 5500 annual reports or unanimous in your conclusion whether the false statements or conclusions were in documents required to be kept by ERISA or both.

Now, what do we mean by a "false statement" or "representation" when we use that term? A "statement" or a

"representation" is false within the meaning of Title 18, United States Code, Section 1027, if untrue when made, and then known to be untrue by the person making it, causing it to be made or aiding and abetting the making of it.

* * *

(Transcript Pages R25-21-26)

THE COURT: I think there is a problem with the language there, as well. I am going to give the instruction, as I said.

Bring out the jury, Pat. Have the Marshal bring out the jury.

(Jury out at 10:20 a.m.)

THE COURT: Be seated, please, folks.

Ladies and gentlemen, I am in receipt of your note, and wanted to answer your note at this time, the note I had received late yesterday afternoon, where you summarized a portion of jury instruction Number 12.

Can you hear me okay?

THE JUROR: Very little.

THE COURT: Let me use this mike.

Can you hear me okay now?

I want to try and answer the question you gave me late yesterday afternoon.

In that note you laid out a portion of the instruction on count 12 dealing with conspiracy, which is the first count of the Indictment, and then your question to me read as follows it says: We understand that if we unanimously vote guilty on at least one offense, then the verdict would be guilty. What we don't understand is if that there is no unanimous agreement on any one offense, then is the defendant not

guilty or do we continue to deliberate until there is an unanimous decision either way? That was the question that I had received that I would like to answer for you now.

First, let me remind you of what I said in instruction Number 27. Let me read it to you again. It reads as follows, the entire instruction: Any verdict you reach in the jury room, whether guilty or not guilty, must be unanimous. In other words, to return a verdict you must all agree. Your deliberations will be secret; you will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case do not hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

Remember, ladies and gentlemen, that in a very real way you are judges here, you are judges of the facts, and your only interest in this courtroom is to seek the truth from the evidence in the case.

Now, let me also repeat and then expand upon the instruction that I gave you in 12. I said the following in instruction Number 12, which you have in front of: In this instance, with regard to the alleged conspiracy—now we are talking just about—just about the first count of the Indictment, the conspiracy count—in this instance, with regard to the alleged conspiracy, the Indictment charges that the defendant conspired to commit three separate substantive crimes or offenses.

One, to make false statements and representations of fact, knowing them to be false, and to knowingly conceal, cover up, and fail to disclose facts, in documents required by

Title I of ERISA to be kept as part of the records of the Mid-Jersey Trucking Industry Local 701 Pension Fund, which I shall also refer to in these instructions as "the fund," and in the form 5500 annual reports which are required by such title to be published.

Second, the defendant is charged in count one with conspiracy to embezzle and unlawfully and willfully convert to his own use and to the use of another monies, properties, credits and assets of the funds and monies, properties credits and assets of funds connected with the fund.

And, third, it's charged in count one of the conspiracy count that the defendant conspired to use the mails in furtherance of a scheme and artifice to defraud and to obtain monies and properties of the fund and monies and properties of funds connected with the fund by means of false and fraudulent pretenses and representations.

In such a case it's not necessary for the Government to prove that the defendant under consideration willfully conspired to commit all of those substantive offenses. It would be sufficient if the Government proves, beyond a reasonable doubt, that the defendant willfully conspired with someone to commit one of those offenses; but, in order to return a verdict of guilty, you must unanimously agree upon which of the three offenses the defendant conspired to commit. If you can't agree in that manner, you must find the defendant not guilty.

Now, with regard to count one, in order to return a verdict of guilty as to count one, in addition to the elements as laid out in instruction Number 11, you must also be unanimous that the Government haw proven beyond a reasonable doubt that the defendant committed at least one of the objects or offenses as charged in count one. You must all agree in order to return a verdict of guilty upon which of the three offenses the defendant committed. In order to return a verdict of not guilty as to count one, you must all be

unanimous in your finding that the Government has not proven beyond a reasonable doubt that the defendant committed any of the objects of the conspiracy.

Now, if you are unable to reach unanimous agreement as to count one or, indeed, as to any other count, then you would be unable to return a verdict as to that particular count.

Now, you will recall, additionally, that I instructed you at the outset in instruction Number 1 in the following way: I said to you, ladies and gentlemen, that you must make your decision only on the basis of the testimony and other evidence presented here during the trial, and you must not be influenced in any way by either sympathy or prejudice for or against the defendant or the Government. I also said—and I have repeated this on a number of occasions for you as you begun your deliberations—and I would like to underscore it again—you must follow the law as I explain it to you whether you agree with the law or not, and you must follow all of my instructions as a whole. You may not single out of disregard any of the Court's instructions on the law.

The Indictment, or formal charge against the defendant, is not evidence of guilt. Indeed, the defendant is presumed by the law to be innocent. The law does not require a defendant to prove his innocence or to produce any evidence at all. The Government has the burden of proving a defendant guilty beyond a reasonable doubt, and if it fails to do so, you must find the defendant not guilty.

You will also recall that I instructed you in the second instruction as to the meaning of "reasonable doubt," and I said, and I repeat: While the Government's burden of proof is a strict or a heavy burden, it is not necessary that the defendant's guilt be proved beyond all possible doubt. It is only required that the Government's proof exclude any reasonable doubt concerning the defendant's guilt.

A "reasonable doubt" is a real doubt based upon reason and common sense after careful and impartial consideration of all of the evidence in the case.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the defendant has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

With that, I am going to ask you folks if you would be kind enough to go back into the jury room and to please continue your deliberations at this point.

And I will ask the Marshal if he would be kind enough to help the jury back into the jury room. Mr. Marshal.

And thank you again, folks, for your considerable efforts in connection with this matter.

(Jury out at 10:29 a.m.)

No. 91-1074

In the Supreme Court of the United States

OCTOBER TERM, 1991

ALLAN F. MEYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

1. Whether the district court's instruction that the jury could neither convict nor acquit petitioner without unanimous agreement lessened the government's burden of proving all the elements of a conspiracy offense.

2. Whether the district court's instruction describing certain criminal acts disjunctively improperly broadened and amended the indictment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1) is unreported, but the judgment is noted at 943 F.2d 1317 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1991. A petition for rehearing was denied on September 24, 1991. Pet. App. 2. The petition for a writ of certiorari was filed on December 23, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of making false and fraudulent statements in pension fund annual reports and in documents required to be kept under the Employee Retirement Income Security Act (ERISA), in violation of 18 U.S.C. 1027; and conspiracy to commit that offense, in violation of 18 U.S.C. 371. He was sentenced to a one-year term of imprisonment. The court of appeals affirmed. Pet. App. 1.

1. In 1978, Joseph J. Higgins, a lawyer and former state legislator, formed the Omni Group, a mortgage brokerage company in Fort Lauderdale, Florida. In 1982, Omni entered into an agreement with the International Brotherhood of Teamsters Local 701 Pension Fund, an employee benefit plan subject to ERISA. The agreement provided that Omni would invest $20 million of Fund assets in commercial and residential real estate mortgages. The money was placed in a trust account and Omni was named as the trustee. Gov't C.A. Br. 2-4.

Petitioner is an owner of the Latado Fruit Company. In July 1983, that company purchased and then attempted to syndicate, as a tax-sheltered investment, a working citrus grove. Gov't C.A. Br. 5-6. In the fall of 1983, petitioner suggested to Higgins that he purchase the grove, and Higgins unsuccessfully attempted to obtain financing. *Id.* at 6-7. Higgins then turned to Omni and the Fund to secure a loan. *Id.* at 8. Under ERISA, Higgins was a fiduciary of the Fund and was therefore prohibited from borrowing money through Omni to purchase the grove. 29 U.S.C. 1002(21)(A), 1106(a)(1)(B). See Gov't C.A. Br. 3, 30-34. To circumvent that restraint and conceal his involvement, Higgins suggested that petitioner borrow the money from Omni, and petitioner agreed. *Id.* at 8-9.

Petitioner obtained a loan from Omni through Glades Citrus—another of petitioner's companies—and used that money to purchase the citrus grove. Gov't C.A. Br. 8-10. Glades Citrus then conveyed the property to Glades Grove, an unincorporated company controlled by Higgins. *Id.* at 10. After completing the transaction, petitioner and Higgins took steps to conceal Higgins' interest in the grove. Higgins' name did not appear on the loan documents, nor was Higgins' interest in the property ever disclosed to the Fund in any manner. *Id.* at 9, 11-12. Higgins made payments to petitioner, who then made the loan payments to Omni, camouflaging Higgins' involvement. *Id.* at 12.

In compliance with ERISA reporting requirements, the Fund's accountant prepared Form 5500 annual reports for the 1983 and 1984 tax years identifying Fund investments, including party-in-interest transactions. Gov't C.A. Br. 21. The Fund's accountant prepared those forms using Omni's monthly bank statements and loan documents. As a result of Higgins' and petitioner's actions, there was no disclosure of Higgins' interest in the Glades Citrus loan. *Id.* at 9, 21.

2. Count 1 of the indictment charged petitioner with conspiring to: (1) make false statements and omissions of fact in documents required to be kept by Title I of ERISA as part of the records of the Fund and in reports required to be published, in violation of 18 U.S.C. 1027; (2) embezzle and unlawfully convert money and property of the Fund to his own use, in violation of 18 U.S.C. 664; and (3) use the mails in furtherance of a scheme to defraud, in violation of 18 U.S.C. 1341. Count 2 charged petitioner with making false statements and misrepresentations of fact "in the annual financial reports [Form 5500s] required to be published by the Fund * * * and in documents required to be kept by Title I of ERISA as part of the records of the Fund," in

violation of 18 U.S.C. 1027. See Gov't C.A. Br. App. 1, at 12.

The district court instructed the jury that to convict petitioner on Count 1, it "must unanimously agree upon which one of the three offenses the defendant conspired to commit." C.A. Record Excerpts 26. The district court also gave an instruction relating to multiple object conspiracies, based on the Eleventh Circuit's Pattern Jury Instruction 4.2 (see Gov't C.A. Br. App. 3, at 12), which stated in pertinent part as follows:

> [I]t is not necessary for the Government to prove that the Defendant under consideration willfully conspired to commit all of those substantive offenses. It would be sufficient if the Government proves, beyond a reasonable doubt, that the Defendant willfully conspired with someone to commit *one* of those offenses; but, in that event, in order to return a verdict of guilty, you must unanimously agree upon *which* of the three offenses the Defendant conspired to commit. If you cannot agree in that manner, you must find the Defendant not guilty.

C.A. Record Excerpts 21-22 (Instruction 12).

On Count 2, the ERISA violation, the district court instructed the jury that it must unanimously agree that petitioner had falsified either the annual reports or other ERISA-required documents or both. The court stated in pertinent part:

> Now, ladies and gentlemen, in determining whether the Government has proved the third element—this is on count two—beyond a reasonable doubt, you must be unanimous in your conclusion whether the false statements or concealments of fact were in the form 5500 annual reports *or* unanimous in your conclusion whether the false state-

> ments or conclusions were in documents required to be kept by ERISA *or* both.

C.A. Excerpts 29-30 (emphasis added). See also *id.* at 23 (Instruction 14).

Petitioner objected to the court's instruction on Count 2, which allowed the jury to convict on the basis of false statements in the Form 5500 annual reports *or* in other documents. Gov't C.A. Br. 55. At petitioner's request, the district court instructed the jury that a guilty verdict must be based on their unanimous agreement as to which documents petitioner had falsified. *Id.* at 55-58. Except for that objection, petitioner raised no objections to the court's instructions prior to the jury's commencement of deliberations. *Id.* at 55-60.

On the fourth day of deliberations the jury sent a note to the judge requesting clarification of the court's instructions. The note first laid out a portion of the multiple object conspiracy instruction and then stated:

> We understand that if we unanimously vote guilty on at least one offense, then the verdict would be guilty. What we don't understand is if that there is no unanimous agreement on any one offense, then is the defendant not guilty or do we continue to deliberate until there is an unanimous decision either way?

Pet. App. 6-7; C.A. Record Excerpts 31-32. Petitioner asked the court to instruct the jury that if it could not unanimously agree on which offense he had committed, it must return a verdict of "not guilty." Gov't C.A. Br. 61. The district court refused to give that instruction on the ground that it was not a "fair statement" of the law. *Ibid.* The court answered the jury's question by rereading its general unanimity instructions. The court observed that the jury must agree unanimously on which of the objects or offenses petitioner conspired to

commit, and it reread the previous jury instruction on a multiple-object conspiracy (Instruction 12), adding:

> Now, with regard to count one, in order to return a verdict of guilty verdict as to count one, in addition to the elements as laid out in instruction Number 11, you must also be unanimous that the Government ha[s] proven beyond a reasonable doubt that the defendant committed at least one of the objects or offenses as charged in count one. You must all agree in order to return a verdict of guilty upon which of the three offenses the defendant committed. In order to return a verdict of not guilty as to count one, you must all be unanimous in your finding that the Government has not proven beyond a reasonable doubt that the defendant committed any of the objects of the conspiracy.
>
> Now, if you are unable to reach unanimous agreement as to count one, or indeed, as to any other count, then you would be unable to return a verdict as to that particular count.

Pet. App. 8-9; C.A. Record Excerpts 34-35. The jury thereafter found petitioner guilty on the conspiracy and false statement counts, and the court of appeals affirmed petitioner's conviction without opinion. Pet. App. 1.

ARGUMENT

1. Petitioner contends (Pet. 8-14) that the district court responded incorrectly to the jury's questions concerning the need for unanimity. In particular, petitioner contends that the court's instruction lessened the government's burden of proof. That claim is without merit. The district court's supplemental oral instruction simply clarified that the jury's verdict—whether "guilty" or "not guilty"—must be unanimous.

The crux of petitioner's argument is that if the jury "cannot agree unanimously that the government proved a single object beyond a reasonable doubt, the only permissible verdict is not guilty." Pet. 12. That statement is plainly incorrect. Rule 31(a) of the Federal Rules of Criminal Procedure unambiguously states: "The verdict shall be unanimous." A verdict of guilty is appropriate only if the jury unanimously finds that the government has proved every element of the charged offense beyond a reasonable doubt. See, *e.g.*, *In re Winship*, 397 U.S. 358 (1970). A verdict of not guilty is appropriate only if the jury unanimously finds that the government has failed to prove at least one such element beyond a reasonable doubt. If the jurors cannot unanimously agree, then the result is that no verdict is rendered and the court must declare a mistrial. See, *e.g.*, *United States* v. *Arpan*, 887 F.2d 873, 877 (8th Cir. 1989).

Petitioner's mistaken understanding of the unanimity requirement leads him to take issue (Pet. 10-11) with a portion of the court's supplemental oral instruction. Petitioner challenges the sentence that stated:

> In order to return a verdict of not guilty as to count one, you must all be unanimous in your finding that the Government has not proven beyond a reasonable doubt that the defendant committed any of the objects of the conspiracy.

Pet. App. 8-9. Petitioner contends that this sentence "substantially lessened the government's burden of proof." Pet. 11. That statement, however, says nothing about the burden of proof. Moreover, it "must be considered in the context of the instructions as a whole and the trial record." *Estelle* v. *McGuire*, 112 S. Ct. 475, 482 (1991). It is clear from its context that the instruction had no such effect.

The sentence is one part of a longer oral passage, set out above, in which the court first made clear that the jury could convict only if it unanimously found that the government proved one of the objects of the conspiracy. See Pet. App. 8 ("in order to return a verdict of guilty * * * you must also be unanimous that the Government ha[s] proven beyond a reasonable doubt that the defendant committed at least one of the objects or offenses as charged"). The statement that petitioner challenges simply expressed a corollary of that principle: the jury could acquit if it unanimously found that petitioner did not conspire to commit any of the identified objects or offenses. In that circumstance, the government would have failed to prove an essential element of the conspiracy offense. See 18 U.S.C. 371. Thus, read in context, the instruction simply restated the incontestable proposition that the jury's verdict—whether guilty or not guilty—must be unanimous.[1]

2. Petitioner also contends (Pet. 14-16) that the court's instruction concerning the substantive violation in Count 2— requiring unanimous agreement as to whether the false statements existed in either the Form 5500 annual reports *or* in documents required to be kept by ERISA *or* both—diverges from the offense described in the indictment. Petitioner observes that

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[1] Petitioner's contention (Pet. 8) that the appellate court's decision conflicts with decisions of other courts of appeals is not well founded. In each of the cases petitioner cites, the appellant successfully claimed that the district court committed reversible error by refusing to instruct the jury that it had to agree that the defendant had committed at least one of the charged offenses before returning a guilty verdict. See *United States* v. *Duncan*, 850 F.2d 1104, 1114 (6th Cir. 1988), cert. denied, 493 U.S. 1025 (1990); *United States* v. *Ballard*, 663 F.2d 534, 544 (5th Cir. 1981); *United States* v. *Gipson*, 553 F.2d 453, 458-459 (5th Cir. 1977). Here, by contrast, the district court gave just such an instruction to the jury.

the indictment charged those acts conjunctively, and he argues that the instruction's disjunctive form "impermissibly broadened and constructively amended the charge." Pet. 15. That argument is without merit. It is common—and entirely proper—for indictments to charge in the conjunctive but the jury to be instructed in the disjunctive, if the statute at issue is worded in the disjunctive. See *United States* v. *UCO Oil Co.*, 546 F.2d 833, 838 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977); *Gerberding* v. *United States*, 471 F.2d 55, 59 (8th Cir. 1973). Moreover, as this Court recently reiterated in *Griffin* v. *United States*, 112 S. Ct. 466 (1991), "when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, * * * the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Id.* at 473, quoting *Turner* v. *United States*, 396 U.S. 398, 420 (1970). The court's instruction was consistent with that settled rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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